HOCK PENG REALTY SDN BHD v. TING SIE CHUNG & ANOTHER APPEAL

COURT OF APPEAL, KUCHING
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEALS NO: Q-02(W)-1129-06-2016
& Q-02(W)-343-02-2017]
27 JULY 2017

TORT: *Defamation – Absolute privilege – Prohibitory order – Defendant obtained prohibitory order against plaintiff's land – Whether there were false and malicious statements in prohibitory order – Whether documents instrumental for instituting court proceedings fall under category of absolute privilege – Whether cause of action for defamation must fail in limine*

TORT: *Cause of action – Abuse of process of court – Parties entered into consent order for assessment of damages – Defendant obtained prohibitory order against plaintiff's land – Whether in breach of agreed terms – Failure to serve papers on plaintiff – Whether court process used for unlawful purpose and not for actual purpose intended to achieve justice – Whether cause of action sustainable*

A property development company ('the plaintiff') had advanced some money to the defendant in anticipation of developing a piece of land belonging to the defendant. The deal, however, did not go through and the defendant did not pay the sum advanced. The plaintiff then took the opportunity to caveat the defendant's land. The caveat was subsequently removed and damages were asked to be assessed before the court. The plaintiff and the defendant had by a consent order agreed that they would proceed with the assessment of damages but the payment of the assessment was to be stayed pending appeal process. The Deputy Registrar had assessed the damages and the defendant in breach of the agreed terms issued a writ of seizure and sale and subsequently obtained a prohibitory order against the plaintiff's land and that too, *ex parte* without having served any papers on the plaintiff, notwithstanding that the appeal process had not been exhausted. The plaintiff submitted that in consequence of the conduct of the defendant, there was a cause of action for defamation for false and malicious statements in the prohibitory order. The plaintiff also argued that the breach of consent terms leading to the writ of seizure and sale as well as the prohibitory order entitled it to a cause of action in tort of abuse of process of the court. The trial judge held that the publications complained of in respect of and/or related to court proceedings would not attract a successful cause of action in defamation based on the concept of absolute privilege. The trial judge however held that the plaintiff had succeeded in the cause of action against the tort of abuse of process of court and awarded only damages in the sum of RM50,000 on the ground that the writ and seizure and sale and the prohibitory order were

never served on the plaintiff and was only discovered by the plaintiff upon search being done. Two appeals arose from the said decision of the High Court. The plaintiff's appeal ('first appeal') was related to the complaint of the plaintiff that the trial judge had dismissed the cause of action in defamation and only provided a sum of RM50,000 for the tort of abuse of process of court, while the defendant's appeal ('second appeal') was related to the complaint that the court should not have allowed the claim for tort of abuse of process.

Held (dismissing both appeals)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Any publication within the norms of court proceedings will attract the concept of absolute privilege. Where the statute provides for privilege, the usage of publications for the purpose stated as per the statute will always be accorded the status of absolute privilege. In the instant case, the High Court Judge took the view that everything done from the inception of the proceedings and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and including the writ or other document which was instrumental for instituting the proceedings falls under the category of absolute privilege (*Lincoln v. Daniels*, refd). Thus, this court agreed with the trial judge's finding that absolute privilege applied herein. The cause of action for defamation must fail *in limine* as it was related to proceedings as per the rules of court. (paras 11 & 16)

(2) Abuse of process of court refers to a situation where the court's process is used for unlawful purpose and not for the actual purpose intended to achieve justice. In the instant case, it was not one related to abuse of process in a matter before the court and an action taken in the court proceedings itself to arrest the abuse. The action in this case was related to common law tort and on the facts, the trial judge had taken the view that it was a sustainable cause of action based on the primary facts that the defendant in breach of consent terms had initiated proceedings through court process. On the issue of tort of abuse of process of court and damages thereof, this court agreed with the trial judge's findings. (paras 14-16)

Bahasa Malaysia *Headnotes*

Sebuah syarikat pembangunan tanah ('plaintif') telah menganjurkan wang kepada defendan dengan tujuan untuk membangunkan sebidang tanah milik defendan. Perjanjian itu, walau bagaimanapun, tidak diteruskan dan defendan tidak membayar balik wang yang dianjurkan. Plaintif mengambil kesempatan untuk mengkaveatkan tanah defendan. Kaveat kemudiannya dibatalkan dan ganti rugi dipohon untuk ditaksirkan di mahkamah. Plaintif dan defendan melalui satu perintah persetujuan bersetuju bahawa mereka akan meneruskan

pentaksiran ganti rugi tetapi bayaran taksiran akan tergantung sementara menunggu proses rayuan. Timbalan Pendaftar mentaksirkan ganti rugi dan defendan telah melanggar syarat-syarat yang dipersetujui dengan mengeluarkan writ penyitaan dan penjualan dan seterusnya memperoleh perintah larangan terhadap tanah plaintif secara *ex parte* tanpa menyerahkan apa-apa dokumen kepada plaintif, walaupun proses rayuan belum selesai. Plaintif menghujahkan bahawa akibat daripada perlakuan defendan, terdapat kausa tindakan fitnah atas kenyataan palsu dan niat jahat dalam perintah larangan. Plaintif juga menghujahkan bahawa pelanggaran syarat persetujuan yang membawa kepada writ penyitaan dan penjualan dan juga perintah larangan memberikan hak kepadanya untuk memulakan kausa tindakan penyalahgunaan proses mahkamah. Hakim bicara memutuskan bahawa penerbitan berhubungan dengan/atau prosiding mahkamah tidak akan meraih kausa tindakan fitnah berdasarkan konsep perlindungan mutlak. Hakim bicara walau bagaimanapun memutuskan plaintif berjaya dalam kausa tindakannya terhadap tort penyalahgunaan proses mahkamah dan mengawardkan ganti rugi dalam jumlah RM50,000 atas alasan writ penyitaan dan penjualan dan perintah larangan tidak pernah diserahkan kepada plaintif dan hanya diketahui oleh plaintif apabila carian dilakukan. Dua rayuan timbul daripada keputusan Mahkamah Tinggi tersebut. Rayuan plaintif ('rayuan pertama') berhubungan dengan dakwaan plaintif bahawa hakim bicara telah menolak kausa tindakan fitnah dan hanya memberikan jumlah RM50,000 untuk tort penyalahgunaan proses mahkamah sementara rayuan defendan ('rayuan kedua') berhubungan dengan dakwaan bahawa mahkamah tidak sepatutnya membenarkan tuntutan tort penyalahgunaan proses.

Diputuskan (menolak kedua-dua rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Apa-apa penerbitan dalam norma prosiding mahkamah akan meraihkan konsep perlindungan mutlak. Di mana statut memperuntukkan perlindungan, penggunaan penerbitan bagi tujuan yang dinyatakan dalam statut akan sentiasa diberikan status perlindungan mutlak. Dalam kes ini, Hakim Mahkamah Tinggi berpendapat bahawa segala yang dilakukan dari permulaan prosiding dan menjangkau semua pliding dan dokumen-dokumen lain yang diwujudkan bagi tujuan prosiding dan termasuk writ atau apa-apa dokumen lain yang penting untuk memulakan prosiding terangkum dalam kategori perlindungan mutlak (*Lincoln v. Daniels*, dirujuk). Oleh itu, mahkamah ini bersetuju dengan dapatan hakim bicara bahawa perlindungan mutlak diguna pakai dalam kes ini. Kausa tindakan fitnah harus gagal *in limine* kerana ia berhubungan dengan prosiding seperti peraturan mahkamah.

(2) Penyalahgunaan proses mahkamah merujuk pada keadaan di mana proses mahkamah digunakan untuk tujuan menyalahi undang-undang dan bukan untuk tujuan sebenar iaitu untuk mencapai keadilan. Dalam kes ini, ia bukan berhubungan dengan penyalahgunaan proses mahkamah dalam perkara di hadapan mahkamah dan guaman dimulakan dalam prosiding mahkamah untuk menangani penyalahgunaan. Tindakan dalam kes ini berhubung dengan undang-undang tort dan atas fakta, hakim bicara berpendapat kausa tindakan harus dikekalkan berdasarkan fakta utama bahawa defendan dalam melanggar syarat-syarat persetujuan telah memulakan prosiding melalui proses mahkamah. Berkenaan isu tort penyalahgunaan proses mahkamah dan ganti rugi yang diberikan, mahkamah ini bersetuju dengan dapatan hakim bicara.

Case(s) referred to:
Beresford v. White (1914) 30 TLR 591 ***(refd)***
Castro v. Murray (1875) LR 10 Ex 213 ***(refd)***
Hock Peng Realty Sdn Bhd v. Ting Sie Chung [2016] 8 CLJ 393 HC ***(refd)***
Lincoln v. Daniels [1961] 3 All ER 740 ***(refd)***
Royal Aquarium v. Parkinson [1892] 1 QB 431 ***(refd)***
Watson v. McEwan [1905] AC 480 ***(refd)***
Wescott v. Wescott [2008] EWCA Civ 818 ***(refd)***
Yeo Ing King v. Melawangi Sdn Bhd [2017] 1 CLJ 512 CA ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 18 r. 19

Other source(s) referred to:
Gatley on Libel and Slander, 12th edn, p 461
Janab's Key To Civil Procedure, 5th edn, pp 252-255
Ramasamy Iyer's, The Law of Torts, 10th edn, pp 407-410

(Civil Appeal No: Q-02(W)-1129-06-2016)
For the appellant - Lim Heng Choo, George Lim & Alvin Wong; M/s Lim & Lim Advocs
For the respondent - Chong Siew Chiang, George Lo & Carole Ngu; M/s George Lo & Partners

(Civil Appeal No: Q-02(W)-343-02-2017)
For the appellant - Chong Siew Chiang, George Lo & Carole Ngu; M/s Chong Brothers Advocs
For the respondent - Lim Heng Choo, George Lim & Alvin Wong; M/s Lim & Lim Advocs

[Editor's note: For the High Court judgment, please see Hock Peng Realty Sdn Bhd v. Ting Sie Chung [2016] 8 CLJ 393 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] There were two appeals fixed for hearing before us on 18 April 2017 arising from the same decision of the High Court related to defamation and tort of abuse of process of court.

[2] Appeal No. Q-02(W)-1129-06-2016 (first appeal) is the appeal of the plaintiff in the High Court Suit No. 22-53-2009 and appeal No. Q-02(W)-343-02-2017 (second appeal) is the appeal by the defendant.

[3] The first appeal is related to the complaint of the plaintiff that the learned judge had dismissed the cause of action in defamation and only provided a sum of RM50,000 for the tort of abuse of process of court.

[4] The second appeal is related to the complaint that the court should not have allowed the claim for tort of abuse of process.

Brief Facts

[5] The plaintiff's action has a chequered history. The learned trial judge has documented the history, the facts and law in articulate manner. (See *Hock Peng Realty Sdn Bhd v. Ting Sie Chung* [2016] 8 CLJ 393). For the purpose of both the appeals, we do not wish to repeat what was said in the judgment, save to say that this judgment must be read together with our judgment to appreciate our grounds in the proper perspective.

[6] We will summarise the facts in our own words as follows:

(a) The plaintiff, a property development company, has advanced some money to the defendant in anticipation of developing the land belonging to the defendant.

(b) The deal did not go through and the defendant did not pay the sum advanced and the plaintiff took the opportunity to caveat the defendant's land.

(c) The caveat was subsequently removed and damages were asked to be assessed before the court.

(d) The plaintiff and defendant had by a consent order agreed that they will proceed with the assessment of damages but the payment of the assessment was to be stayed pending appeal process.

(e) The Deputy Registrar had assessed the damages and the defendant in breach of the agreed terms issued a writ of seizure and sale and subsequently obtained a prohibitory order against the plaintiff's land and that too *ex parte,* without having served any papers on the plaintiff, notwithstanding the appeal process has not been exhausted.

(f) The plaintiff says that in consequence of the conduct of the defendant, there is cause of action for defamation for false and malicious statements in the prohibitory order. The said prohibitory order lodged against the plaintiff reads as follows:

MALAYSIA

IN THE HIGH COURT OF SABAH AND SARAWAK
AT BINTULU

APPLICATION FOR EXECUTION NO. 36-01-2007 (BTU)

[ORIGINATING SUMMONS NO. 24-47-2000 (BTU)]

BETWEEN

TING SIEH CHUNG
508, Taman Li Hua,
Bintulu, Sarawak. ... Plaintiff/Judgment Creditor

AND

HOCK PENG REALTY SDN BHD
Bangunan Toh Boon Khim &
Soon Pek Guaxi,
186A-B, Jalan Tun Haji Openg
Sibu, Sarawak. ... Defendant/Judgment Debtor

PROHIBITORY ORDER
(O. 47 R. 6)

TO: The abovenamed Defendant/Judgment Debtor
HOCK PENG REALTY SDN BHD
Bangunan Toh Boon Khim &
Soon Pek Guan,
186A-B, Jalan Tun Haji Openg,
Sibu, Sarawak

WHEREAS you the said HOCK PENG REALTY SENDIRIAN BERHAD, the above-named Defendant/Judgment Debtor has failed to satisfy an Order given on 30th day of January 2007 and dated the 29th day of February 2007 in favour of TING SIEH CHUNG, the Plaintiff/Judgment Creditor, for the sum of RM1,842.073.91 (as at 15th May 2007) together with the interest at the rate of 8% per annum from the 30.01.2007 until the full settlement and costs which shall be paid by the Defendant/Judgment Debtor to the Advocates for the Plaintiff/Judgment Creditor.

IT IS ORDERED that you the said HOCK PENG REALTY SENDIRIAN BERHAD be and you are hereby, for a period commencing from of the date of registration of this Order under the provisions expiry of six(6) months from the date of this Order, prohibited and restrained from transferring, charging or leasing the properties specified in the SCHEDULE hereunder or creating any lien or equitable charge thereof by deposit of any instrument of title.

SCHEDULE

(1) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 3,534 Sq. Metres, more or less, and described as LOT 3368 BLOCK 19 SEDUAN LAND DISTRICT.

(2) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 2,964 Sq. Metres, more or less, and described as LOT 3369 BLOCK 19 SEDUAN LAND DISTRICT.

(3) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 2,999 Sq. Metres, more or less, and described as LOT 3158 BLOCK 19 SEDUAN LAND DISTRICT.

(4) All that the said HOCK PENG REALTY SENDIRIAN BERHAD's right title share and interest in all that parcel of land with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 4,855 Sq. Metres, more or less, and described as LOT 3801 BLOCK 19 SEDUAN LAND DISTRICT.

(5) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Jalan Wong King Huo, Sibu, containing an area of 1,4324 Hectares, more or less, and described as LOT 3585 BLOCK 7 SIBU TOWN DISTRICT.

(6) All that the said HOCK PENG REALTY SENDIRIAN BERHAD'S right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Upper Lanang Road, Sibu, containing an area of 4,471 Hectares, more or less, and described as LOT 976 BLOCK 10 SIBU TOWN DISTRICT.

(7) All that the said HOCK PENG REALTY SENDIRIAN BERHAD's right title share and interest in all that parcel of land together with the building thereon and appurtenances thereof situate at Jalan Deshon, Sibu, containing an area of 994.1 Sq. Metres, more or less, and described as LOT 2923 BLOCK 4 SUNGAI MERAH TOWN DISTRICT."

(hereinafter referred to as "the said 7 pieces of Lands").

(g) The plaintiff also says the breach of consent terms leading to the writ of seizure and sale as well as the prohibitory order entitles it to a cause of action in tort of abuse of process of court.

(h) The learned trial judge held that the publications complained of in respect of and/or related to court proceedings will not attract a successful cause of action in defamation based on the concept of absolute privilege.

(i) The learned judge held that the plaintiff had succeeded in the cause of action against the tort of abuse of process of court and awarded only damages in the sum of RM50,000 on the ground that the writ of seizure and sale and the prohibitory order were never served on the plaintiff and was only discovered by the plaintiff upon search being done.

Preliminaries

[7] In the instant case, we note that the plaintiff's claim is essentially based on defamation and the claim in respect of abuse of process of court was incidental in nature without any specifics. However, parties in the submission did not take up the issue what are the elements needed to be proved for tort of abuse of process of court. In consequence, we will not dwell with this issue.

[8] The memorandum of appeal for the first appeal reads as follows:

> The Appellant, HOCK PENG REALTY SDN BHD being dissatisfied with such part of the learned High Court Judge's decision given on 20.5.2016 concerning:
>
> (a) The Appellant's claim for defamation is dismissed;
>
> (b) Damages to the Appellant for abuse of process is assessed at RM50,000.00 with interest of 5% per annum from 20.05.2016 until full and final payment; and
>
> (c) Each party to bear their own cost.
>
> appeal against the above parts of the said High Court Judge's decision to the Court of Appeal on the following grounds.
>
> ABSOLUTE PRIVILEGE SHOULD NOT APPLY TO *EX PARTE* ORDER
>
> (1) The learned High Court Judge erred in law and in fact in holding that the absolute privilege in legal proceedings in defamation case as decided in *Lincoln v. Daniels* [1961] 3 All ER 740, and in particular, the second category would apply to an *ex parte* Prohibitory Order contrary to the two House of Lord cases of *Roy v. Prior* [1970] 2 All ER 729 and *Taylor v. Serious Fraud Office* [1999] 2 AC 177.

(2) The learned High Court Judge failed to appreciate that the *ex-parte* Prohibitory Order obtained against the Appellant's 7 parcels of lands where the Respondent deliberately failed to serve on the Appellant but registered the said *ex-parte* Prohibitory Order and extended 3 times without valid reason on *ex-parte* basis and registered in the Land Registry at Sibu would amount to malice on the part of the Respondent.

(3) The learned High Court Judge had misdirected herself and made erroneous finding that the failure to serve the *ex-parte* Prohibitory Order and its 3 extensions which were registered against the Appellant's 7 parcels of lands were not malicious.

(4) The learned High Court Judge failed to appreciate that the *ex-parte* Prohibitory Order with its 3 extensions and registered against the Appellant's 7 parcels of lands without serving on the same on the Appellant and without applying for the directions for sale would clearly show the true, bad and malicious intention of the Respondent to use *ex-parte* Prohibitory Order to tarnish the good reputation of the Appellant. In such a situation, the learned High Court Judge ought to apply the principles enunciated in *Roy v. Prior* [1970] 2 All ER 729 to disallow the Respondent to abuse the Court process and enjoy the total protection of the Court to defame and tarnish the good reputation of the appellant.

INADEQUATE DAMAGES TO THE APPELLANT FOR ABUSE OF PROCESS IS ASSESSED AT RM50,000.00 WITH INTEREST OF 5% PER ANNUM FROM 20.05.2016 UNTIL FULL AND FINAL PAYMENT

(5) The learned High Court Judge erred in law and in fact in awarding RM50,000.00 damages for abuse of the Court process by taking into improper consideration that there is overlapping with the assessment of damages of unlawful caveats to be assessed in Sibu (as the previous assessment of RM 14,766,900.00 as shown in page 5 of the Judgment was set aside by the Court of Appeal). The learned High Court Judge should not take into account any overlapping in this appeal as the Sibu Court has yet to reassess damages as the result of unlawful caveats.

(6) The learned High Court Judge had failed to appreciate that there is no damages assessed for the unlawful caveats in Sibu as the assessment in Sibu Court was set aside by the Court of Appeal. As such, there is no assessment of damages by the Sibu Court on the unlawful caveats. The learned High Court erred and made erroneous finding by speculating about the assessment of damages and erroneously took into consideration the non-existing assessment for unlawful caveat in Sibu over the same 7 parcels of lands. Such serious misdirection of law and facts had caused a miscarriage of justice.

(7) The learned High Court Judge erred in law and in fact in holding that the *ex-parte* Prohibitory Order without serving on the Appellant did not amount to extortion. The learned High Court Judge failed to appreciate that the extortionate act of the Respondent was the ex-parte application for a Prohibitory Order with 3 extensions and registered in the Appellant's 7 parcels of lands by falsely claiming that the Appellant had failed to satisfy the debt at the Land Registry Sibu thereby forcing the Appellant to make payment for the amount not due and payable due to the Consent Order.

(8) The learned High Court Judge should have appreciated that the extortionate act is this appeal was not the extortionate act as defined in the criminal law. The learned High Court Judge should have appreciated that the extortionate act was the unlawful demand through the *ex-parte* Prohibitory Order with 3 extensions registered against the Appellant's 7 parcels of lands thereby forcing, coercing or unlawfully putting the Appellant in a very difficult position to make payment to the Respondent which was not due and payable.

(9) The learned High Court Judge had also failed to appreciate and made erroneous findings by wrongly accepting the Respondent's evidence that the Respondent took out the Writ of Seizure and Sale and the Prohibitory Order against the Appellant's 7 parcels of lands was merely to secure payment and with no intention to sell the Appellant's 7 parcels of lands to satisfy the debt which was not due and payable.

The learned High Court Judge should appreciate that the Writ of Seizure and Sale and Prohibitory Order was an execution proceeding to seize the Appellant's 7 parcels of lands for sale by public auction to satisfy the debt which was not due and payable and not for security of payment. The learned High Court Judge should have concluded such extortionate action by the Respondent would clearly show malice in this case to enhance the quantum of damages to be awarded to the Appellant.

(10) The learned High Court Judge had misdirected herself in taking all the improper considerations or factors to diminish the award of damages to RM50,000.00 to the Appellant for the seizure of the Appellant's 7 parcels of lands which were in the various stages of development. The learned High Court Judge in referring to *Abdullah bin Mohammad Noor v. Syarikat Pembangunan Setia Jaya* (Civil Suit No. 22-98-2011) case where the learned High Court Judge had awarded RM350,000.00 with RM50,000.00 cost for the abuse of the Court process in obtaining the Writ of Seizure and Sale and Prohibitory Order for one parcel of land belonging to an individual (the Plaintiff) and the said land was not subject to any development. The learned High Court Judge erred in not appreciating that the Appellant's 7 parcels of lands were under various stages of development to be entitled much higher damages than the award the learned High Court Judge gave in *Abdullah bin Mohammad Noor*

v. Syarikat Pembangunan Setia Jaya (Civil Suit No. 22-98-2011) case. The Appellant had submitted that the general damages should be RM15,000,000.00 and aggravated damages of RM5,000,000.00.

(11) The learned High Court Judge should not have taken irrelevant and improper factors and consideration to award RM50,000.00 to the Appellant against the Respondent to deliberately and maliciously abused the Court process by seizing the Appellant's 7 parcels of lands with the *ex-parte* Prohibitory Order (which were extended 3 times) and registered in the titles of the Appellant's 7 parcels of lands at the Land Registry Sibu. The total period of the *ex-parte* Prohibitory Order was 2 years and the learned High Court Judge failed to direct her mind that the 7 parcels of lands' land titles and the records at the Land Registry Sibu would still show the Prohibitory Orders until now thereby permanently tarnish the good name of the Appellant that badly affected the Appellant's business and their dealings with trading partners, sub-contractors and financial institutions which were not rebutted by the Respondent.

(12) The learned High Court Judge failed to refer and accept the undisputed evidence of PW1 as to how the Appellant's business was badly affected in that the suppliers and sub-contractors who demanded upfront payments before supply and work could be carried out. The financial institutions also required more documents to obtain banking facilities. The learned High Court Judge therefore erred in law and in fact in awarding RM50,000.00 damages to the Appellant.

Parties Bear Their Own Cost

(13) The learned High Court Judge erred in not awarding any cost to the Appellant by wrongly concluding that the failure of the Appellant's cause of action on defamation would disentitle the Appellant to any cost in succeeding in the Appellant's cause of action on abuse of Court process in the same action.

(14) The learned High Court Judge failed to appreciate that the Appellant was entitled to commence an action against the Respondent on two different causes of actions i.e. defamation and/or abuse of the Court process. The Appellant in succeeding to prove the case against the Respondent in the cause of action of abuse of the Court process, the learned High Court Judge ought to have awarded cost to the Appellant as cost would follow the event.

(15) The learned High Court Judge erred in law and in fact in not awarding cost to the Appellant when the Appellant succeeded in the proving on balance of probabilities that the Respondent had abused the Court process by taking out the Writ of Seizure and Sale and Prohibitory Order on an *ex parte* basis to seize the Appellant's 7 parcels of lands whereby the Appellant had suffered loss and damages and should be entitled to cost against the Respondent.

(16) The learned High Court Judge erred in law and in fact in disallowing any cost to be awarded to the Appellant without appreciating the facts that there was no misconduct or improper act on the part of the Appellant to be disentitled to cost. The learned High Court Judge ought to have awarded cost of RM 150,000.00 as prayed for by the Appellant.

(17) Based on the evidence adduced in the High Court, the learned High Court Judge had erred in law and in fact in erroneously finding that absolute privilege in defamation applied to *ex-parte* Prohibitory Order, failed to take into consideration relevant and proper factors in awarding general damages and failed to appreciate that cost should follow the event thereby caused a miscarriage of justice.

[9] The memorandum of appeal for the second appeal reads as follows:

1. The learned Judge erred in law and in fact in finding that the Prohibitory Order obtained by the Appellant constituted the tort of abuse of the Court process for the following reasons:

1.1 On 30.01.2007, the Appellant had obtained Judgment against the Respondent for the sum of RM1,789,938.50 with interests and costs.

1.2 The Judgment was subject to an earlier consent order made on 28.03.2001 that "payment of the amount assessed shall be stayed, till the disposal of the appeal".

1.3 On 16.05.2007, the Appellant applied *ex parte* for a Prohibitory Order to restrain the Respondent from selling seven [7] parcels of land together with Writ of Seizure & Sale.

1.4 It is undisputed that the Appellant did not serve the Writ of Seizure & Sale and the Prohibitory Order on the Respondent and did not proceed with execution on the said lands to enforce payment on the Judgment.

1.5 The learned Judge accepted that the Appellant applied for the Prohibitory Order only to preserve Appellant under the Judgment in his favour.

1.6 The learned Judge accepted that the Appellant applied for the Prohibitory Order without malice.

1.7 There was no evidence that the Appellant tried to use the Prohibitory Order to coerce or extort the Respondent to do anything in order to accomplish a purpose other than that for which the Prohibitory Order was designed and as a result to cause damage.

1.8 The learned Judge ought to have found that the Respondent had not proven that the Prohibitory Order breached the Consent Order and that the elements of the tort of abuse of Court process had not been proven as the consent order does not restrain Appellant from preserving his right under the judgment in his favour.

2. The learned Judge ought to have found that the Respondent's claim in the High Court is barred by *res judicata* as the Respondent had filed the same claim in respect of the same Prohibitory Order in Suit No. 22-51-2009-III for alleged malicious prosecution /abuse of the Court process and the claim was struck out all and the appeals were unsuccessful up to the Federal Court.

3. The learned Judge ought to have held that there was no abuse of the court's process since the learned Judge found that "the prohibitory order was obtained as a form of extortion is unsubstantiated because the said order was never served on the plaintiff. In my view, in order for extortion to arise, the threat must be brought home to the victim and the non-service of the order means that there was no such threat at all" stated in the paragraph iii (a) of the short ruling at page 1(f) of the Record of Appeal.

4. The Learned Judge ought to have held that there was no abuse of the process of court because the process was honesty for the purpose of maintaining the *status quo* of the subject-matter. It was used to seek a purpose which the very process designed for and not for other collateral purpose or ulterior motive.

5. The learned Judge erred in law and in fact in awarding damages of RM50,000.00 to the Respondent when the Respondent had failed to prove any special damages suffered during the trial.

Preliminaries On Tort Of Abuse Of Process Of Court, Abuse Of Court Proceedings And Defamation, In Relation To Publications Arising From Rules Of Court

Defamation

[10] It is now well-established that a limited company will only have a limited cause of action in defamation as opposed to an individual person. (See *Yeo Ing King v. Melawangi Sdn Bhd* [2017] 1 CLJ 512; [2016] MLJU 555). As this issue was not raised by the defendants in the court below or here, we will not deliberate on this issue.

[11] It is also well-established that any publication within the norms of court proceedings will attract the concept of absolute privilege. (See *Royal Aquarium v. Parkinson* [1892] 1 QB 431). Absolute privilege are two types, one specifically conferred by statutes and the other arising in consequence of case laws originating from England. (See Defamation Act 1957; *Gatley on Libel and Slander*, 12th edn. p. 461). Where the statute provides for privilege, the usage of publications for the purpose stated as per the statute will always be accorded the status of absolute privilege. However, if absolute privilege arises from the decisions of court, then one has to scrutinise the decisions of the court to ascertain on what fact and conduct of parties the concept of absolute privilege was accorded. (See *Wescott v. Wescott* [2008] EWCA Civ 818; *Ramasamy Iyer's* '*The Law of Torts*', 10th edn. at pp. 407 to 410).

Abuse Of Process Of Court

[12] It is now well-recognised that there are two types of abuse of process of court. One is related to court proceedings itself where for example the court can order a matter to be struck out under O. 18 r. 19 of the Rules of Court 2012 or inherent jurisdiction or stay proceedings, etc. The applicant who succeeds in such a procedure will only be entitled to costs and not damages.

[13] The other type is the common law action of tort of abuse of process of the court. A claimant who succeeds in the action will be entitled to costs as well as damages, etc.

[14] Both are abuse in a generic term only but the relief and the elements required to establish will be different. It will be based on rules of court and/or laws. Abuse in both generally means everything, which is contrary to good order established by usage. Abuse of process of court refers to situation where the court's process is used for unlawful and not for the actual purpose intended to achieve justice. (See *Castro v. Murray* (1875) LR 10 Ex. 213; *Janab's Key To Civil Procedure*, 5th edn. pp. 252 to 255).

[15] In the instant case, it is not one related to abuse of process in a matter before the court and an action taken in the court proceedings itself to arrest the abuse. The action in this case is related to common law tort and on the facts the learned judge had taken the view that it is a sustainable cause of action based on the primary facts that the defendant in breach of consent terms has initiated proceedings through court process.

[16] We have read the appeal record and the able submissions of the parties. After giving much consideration to the submission in respect of both the appeals, we take the view that both the appeals should be dismissed. Our reasons, *inter alia,* are as follows:

(i) The cause of action for defamation on the facts of the instant case must fail *in limine* as it is related to proceedings as per rules of court. The court had relied on the well-established principles in the case of *Lincoln v. Daniels* [1961] 3 All ER 740 to hold that absolute privilege applies.

(ii) In *Lincoln*'s case, the defendant claimed absolute immunity in respect of communications sent by him to the Bar Council relating to professional misconduct of the plaintiff who was a Queen Counsel. The court made a distinction between A Bench of Inns of Court (which was responsible for conduct of barristers then) and Bar Council (which was an association). The court held that A Bench of the Inns of Court which inquire into the conduct of a member of the Bar will be accorded absolute privilege to the proceedings. However, a complaint to the Bar Council will only have a qualified privilege. Delvin LJ opined that absolute privilege fell into three categories, namely:

(a) All matters that are done *coram judice* and it extends to everything said in the proceedings by the judges, parties, counsel, witnesses and includes documents put in evidence.

(b) Everything done from the inception of the proceedings and extends to all pleadings and other documents brought into existence for the purpose of the proceedings and including the writ or other document which is instrumental for instituting the proceedings.

(c) Privilege attaching to evidence which a witness gave *coram judice* extends to the precognition or proof of that evidence taken by solicitor.

(iii) The third category stated above is said to be the most difficult to define. (See *Watson v. McEwan* [1905] AC 480). It is immaterial whether the proof is or is not taken in the course of proceedings. (See *Beresford v. White* (1914) 30 TLR 591).

(iv) In the instant case, the learned High Court Judge took the view that the second category of absolute privilege set out in *Lincoln*'s case applies.

(v) We are in agreement with reasoning of the learned trial judge to hold that absolute privilege applies. The said part of the judgment reads as follows:

> In the joint reply submission of Hock Peng's 5 counsels, it was submitted that the prohibitory order is not a pleading and neither does it come within the meaning of "other documents brought into existence for the purpose of the proceedings" ie, the second category in *Lincoln*'s case *(supra)*. With respect I am unable to agree with them. Although the prohibitory order is obviously not a pleading nor an affidavit but the order would still in my view fall within the meaning of "other documents ..." stated in the category. This is because the order was made after the application for a writ of seizure and sale has been approved by the court which followed the award of damages in the originating summons and which in the context of this case is the pleading. Since the registration with the Land Office of Sibu is mandated by law for without it, ie, the registration, the prohibitory order would be totally useless and will not have the legal effect for which it was intended, I am further of the view that it does not come within the meaning of publication in the law of defamation. Thus, on these grounds the cause of action founded on defamation fails for the prohibitory order was not published and even if it were, it is completely excused by the defence of absolute privilege.

(vi) On the issue of tort of abuse of process of court and damages thereof, we are inclined to agree with the grounds of judgment of the learned trial judge which read as follows:

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In *Abdullah*'s case *(supra)*, I had ordered RM350,000.00 as damages for abusing the court process. Based on the considerations above and using *Abdullah*'s case *(supra)* as a guideline (which I think that I am entitled to since the decision has gone through the rigours of the appeal process), I would award Hock Peng damages in the sum of RM50,000.00 - not the RM20 million prayed by it. I further order interest at 5% per annum with effect today until full and final settlement thereof. As for cost, since this action is premised on two causes of action but Hock Peng only succeeded in one and also failed to prove their allegation on extortion, I would not order cost against the defendant. In other words, each party is to bear their own costs.

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[17] For reasons stated above, both the appeals are dismissed with no order as to costs. Deposits are to be refunded.

We hereby order so.

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